United Nations **AT**

Administrative Tribunal

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26 July 2001

ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 1007

Case No. 1108: WILSON

Against: The Secretary-General of the United Nations

THE UNITED NATIONS ADMINISTRATIVE TRIBUNAL,

Composed of: Mr. Julio Barboza, Vice-President, presiding; Ms. Brigitte Stern; Mr. Spyridon Flogaitis;

Whereas at the request of David Eugène Wilson, a former staff member of the United Nations), the President of the Tribunal, with the agreement of the Respondent, extended to 31 October 1999 the time limit for the filing of an application with the Tribunal;

Whereas, on 17 November 1999, the Applicant filed an Application containing pleas which read as follows:

"...

1. ..., the Applicant respectfully requests the Tribunal to recommend ...:

- The quashing of the impugned decision of the Administration to abolish the Applicant's post, as well as any subsequent decision thereto to transfer or reassign the Applicant outside the JIU [Joint Inspection Unit], or to otherwise terminate the Applicant's permanent career appointment;

- The immediate reintegration of the Applicant in the JIU work programme, encompassing duties and responsibilities commensurate with his qualifications and experience;

- A written instruction to [the JIU's Executive Secretary, the Director, Division of Administration, the Chief of Personnel], or any other Administration official working with or on behalf of such staff members to cease and desist any and all efforts to impugn the Applicant's personal or professional character, or to otherwise expel him from the JIU;

- [That] the Geneva JAB [Joint Appeals Board] [be reprimanded] for its misfeasance in considering the Applicant's case;

- Referral of the allegations raised by the Applicant above to an independent and *ad hoc* investigative and disciplinary committee (…), in particular to consider the malfeasance at the JIU as well as the apparent misconduct of [the JIU's Executive Secretary, the Director, Division of Administration, and the Under-Secretary-General for Internal Oversight Services] towards the Applicant, including the seeming major violations of the requirements (and application of the associated sanctions) identified in General Assembly resolutions 48/218 A, 548/218 B, and 51/226;

- The award of the sum of one million (USD 1,000,000) dollars as compensation for the actual and consequential damages the Applicant has suffered as a result of the foregoing actions of the Administration, including the injury to the Applicant's physical and mental health;

- The award of the sum of five hundred thousand (USD 500,000) dollars as compensation for the moral injury and damage to his reputation that the Applicant suffered as a result of the above referenced actions of the Administration;

- The award of thirty thousand (USD 30,000) [dollars] in respect of costs, expert, and legal fees incurred by the Applicant through the present date;

- The award of three months' salary to the Applicant for the Administration's unjustified delays and other procedural irregularities committed in the course of this appeal;

- Interest at the rate of ten percent per annum on any and all of the above amounts so recommended to be awarded by the Tribunal, from the date of [the] Applicant's request for administrative review (19 February 1998) through the date any amounts awarded hereunder are finally and fully paid to the Applicant; and

- Such other relief as the Tribunal feels just, fair and equitable under the foregoing circumstances.

...

6. ..., the Applicant respectfully requests the Tribunal to order the Administration to produce for both the Tribunal and the Applicant the following information or items or documents, ...

...

7. ..., the Applicant respectfully requests that the Tribunal allow the Applicant and the Administration to appear before it to answer any questions or provide such factual details as the Tribunal might find necessary, and to orally render closing arguments in the case. ..."

Whereas the Respondent filed his Answer on 15 November 2000;

Whereas, on 2 July 2001, the Tribunal ruled that no oral proceedings would be held in the case;

Whereas the facts in the case are as follows:

The Applicant joined the Joint Inspection Unit (JIU), United Nations Office at Geneva, as a Research Officer at the P-4, step X level, on a two-year fixed-term appointment on secondment from the United States Government, on 28 February 1978. Promoted to the P-5 level as Senior Research Officer effective 1 January 1980, his appointment was made permanent on 1 July 1982. Effective 1 January 1998, the Applicant's P-5 post was abolished. The Applicant was thereafter assigned to posts in Geneva commensurate with his level and experience until his statutory retirement on 30 November 1999.

From 1978 to 1987, the Applicant's performance was consistently rated as excellent or outstanding. The Applicant successfully rebutted his performance evaluation report (PER) covering 1 September 1987 to 31 May 1991 and it was deleted from his file. No PER was prepared for the Applicant thereafter.

On 11 June 1996, the Applicant sent to the Executive Secretary and the "Troika" of Inspectors at JIU, a four-page memorandum complaining that three "key guideline directives" received scant attention in the JIU.

In a memorandum dated 24 June 1996, the Chairman of the JIU sent to the Inspectors the "Proposals for cost-saving and strengthening of the JIU Secretariat" noting that "The Troika

considered the questions of both responding in a positive way to the request of projected savings for 1997 made by [the Administrator] and to the need for concrete measures to strengthen the Secretariat as mandated by several General Assembly resolutions [...], while solving certain difficulties the Unit is facing with some individual staff members". The first of the proposals reads as follows: The Unit wishes to effect the lateral transfer, preferably by exchange of staff of two P-5 Senior Research Officers within the UN system. One of the two P-5 posts would then be frozen for 12 months in 1997, generating cost-savings of US$ 174,000".

By memorandum dated 18 July 1996, the Chairman of the JIU submitted these proposals to the Under-Secretary-General for Administration and Management, adding that "there is another staff-related issue which indeed forms an integral part of the above- mentioned written proposal, but which, due to its serious nature, the Inspectors would prefer to discuss with you personally".

On 22 July 1996, by memorandum, the Executive Secretary of the JIU informed the Applicant that the Inspectors had decided "to request [his] transfer, preferably through an exchange of staff." The following day, in a memorandum to the Executive Secretary, copied to the Inspectors, the Applicant advised them that the transfer request was unacceptable.

Also on 23 July, in a memorandum to the Executive Secretary, copied to the Applicant, the Chairman of the JIU stated: "The Inspectors decided that the unsubstantiated allegations in particular of criminal activities contained in [the Applicant's memorandum of June 11] just cannot be accepted. Any staff member has the right and obligation to raise his/her concerns, but this was not the case in the above-mentioned memorandum."

On 22 August 1996, the Applicant submitted a forty-page report alleging waste, fraud, mismanagement and abuse in the JIU to the Investigation Section of the Office of Internal Oversight Services (IS/OIOS).

On 7 November 1996, a five-page anonymous memorandum was sent –"From present and former staff members of the Joint Inspection Unit" to the Executive Secretary of the JIU with copies to the Chairman of JIU, the Under-Secretary-General for Administration and Management, the Assistant Secretary-General, OHRM, and the Under-Secretary-General for Internal Oversight Services. On 8 November 1996, the Applicant wrote to the IS/OIOS urging that an investigation be undertaken and stating that a five-page memorandum had been sent

detailing the non-observance of policies and procedures, mismanagement and concern at staff harassment. On 6 December, eight JIU staff members wrote to the Executive Secretary disassociating themselves from the 7 November declaration.

On 17 January 1997, the budget proposals for 1998-1999 sent to all Inspectors and JIU staff included a proposal to abolish one P-5 post among the Senior Research Officers, all of which were encumbered by permanent staff members.

On 20 February 1997, the Applicant filed an harassment grievance against the JIU Executive Secretary with the New York Panel on Discrimination and other Grievances.

On 10 April 1997, the Applicant was notified that a fact-finding panel had been created to investigate charges contained in the JIU staff memoranda addressed to the Administration and the OIOS. The Applicant was invited to address the panel.

On 18 April 1997, the Executive Secretary of the JIU advised the Applicant that he had decided to end their exchange of correspondence.

On 21 July 1997, the Executive Secretary notified the Applicant of his new assignment for 1997-1998 advising him that a suitable post for his transfer had not as yet been identified.

On 3 October 1997, the Advisory Committee on Administrative Budgetary Questions recommended abolition of one P-5 Research Officer post in the JIU. On 6 October 1997, the three Senior Research Officers were notified of the impending post abolition, which was awaiting General Assembly approval and were asked whether redeployment, early retirement or termination with compensation was of interest to them. The Applicant replied the following day, stating that he had no preference among the options.

In a memorandum dated 13 October 1997, the Under-Secretary-General for Administration and Management requested that all Heads of Departments and Offices inform him of the action they would take in the event they had staff-encumbered positions that were to be abolished. On 24 October, the Executive Secretary JIU sent to the Director of Administration a list which provided for, *inter alia*, the abolition of the P-5 post. On 3 November, the Applicant met with the Director of Administration, UNOG, to discuss his options.

On 2 December 1997, the Under-Secretary-General for Administration and Management sent a memorandum ordering a comparative review of all staff at the same level by

a departmental panel for completion by 22 December, for departments unable to accommodate staff encumbering posts to be abolished.

On 12 December 1997, the Executive Secretary of the JIU sent the Applicant a memorandum reminding him of his previous discussions with the Director of Administration, UNOG. On 16 December, the Applicant replied that these discussions were hypothetical and that no reason existed at present to make any drastic career decisions.

On 22 December 1997, the Fifth Committee recommended that the General Assembly approve the JIU budget proposal without change, thereby eliminating one P-5 post.

On 23 December 1997, the Executive Secretary, JIU, informed the Applicant by memorandum as follows: "... I have identified the P-5 post encumbered by you for abolition and I recommended that you be offered either a transfer or early retirement ... I am exploring the possibility of offering you to stay with the Unit against the newly created P-4 post without affecting your salary and other entitlements."

The Executive Secretary, JIU, informed the Applicant on 9 February 1998 that, effective 1 January 1998, his post had been abolished and asked him whether he would accept an assignment through the end of the year to complete an on-going report. The Applicant replied on 11 February that he had to concentrate on his plans for the future and rejected the offer.

On 19 February 1998, the Applicant requested the Secretary-General to review the decision to abolish his post, and on 23 February 1998 lodged an appeal with the Geneva Joint Appeals Board (JAB) requesting a suspension of action.

On 3 and 4 March 1997, the Applicant met with the Director of Administration to discuss an agreed termination. However on March 11, the Applicant informed the Chief of Personnel that he would not sign the Memorandum of Understanding regarding his agreed termination due to the United States income tax consequences.

On 26 March 1998, the Geneva JAB concluded that the condition for suspension of action, i.e. non-implementation of the contested decision, had not been met and recommended that the Applicant's request be denied. The Under-Secretary-General for Administration and Management informed the Applicant of the Secretary-General's decision not to accept his request for suspension of action on 3 April 1998.

On 10 July 1998, the Applicant lodged an appeal with the Geneva JAB. on the merits. The Geneva JAB adopted its report on 26 March 1999. Its conclusions and recommendations read as follows:

"**Conclusions and Recommendations**

149. Taking into account all the circumstances of the case, including the particularities of the JIU and the state of the working relations within the Unit, the Panel concludes that the decision to abolish the Appellant's post was properly arrived at.

150. The Panel also concludes that the available evidence and documentation did not support the Appellant's contentions that the abolition of his post was tainted by prejudice or other improper motives.

151. The Panel further concludes that, although the Appellant's attitude did not help, the Administration failed to make every possible effort to settle the Appellant's administrative situation in conformity with the Staff Rules. While the Appellant's statutory rights were safeguarded, the interest of the Organization was disregarded.

152. In view of the aforesaid, the Panel **recommends** that the Administration find, *without further delay*, a special assignment for the Appellant until his statutory retirement. Given the Appellant's statutory retirement in only eight months, this assignment should be searched for in Geneva and it should be commensurate with the Appellant's level and experience.

153. Should the Administration fail to propose such an assignment by 31 May 1999, the Panel **recommends** that the Appellant be compensated in the amount of $30,000.00 (thirty thousands dollars) for lack of action on the part of the Administration.

154. The Panel further **recommends** that, in the meantime, the administrative situation of the Appellant be regularized as a matter of urgency by placing him on special leave with full pay as per staff rule 105.2 which provides that 'In exceptional cases, the Secretary-General may, at his initiative, place a staff member on special leave with full pay if he considers such leave to be in the interest of the Organization."

On 26 May 1999, the Under-Secretary-General for Management transmitted to the Applicant a copy of the JAB report and informed him as follows:

"...

The Secretary-General is in agreement with the recommendation of the Panel and has taken steps to see that it is implemented. In memoranda to you dated 19 April and 21 May 1999, the Director of the Division of Administration in Geneva has set forth in detail your assignments in Geneva which are commensurate with your level and experience. As this action was promptly taken, there is no need to address the Panel's recommendation regarding special leave with full pay.

..."

On 17 November 1999, the Applicant filed the above-referenced Application with the Tribunal.

Whereas the Applicant's principal contentions are:

1. The impugned decision of the Administration to abolish the Applicant's post was taken in retaliation and direct retribution for the Applicant's report to OIOS, and was illusory, procedurally irregular and tainted by malice, ill-will, and prejudice.

2. The failure of the OIOS to investigate seriously the allegations of impropriety made by the Applicant, its failure to protect the Applicant's anonymity, and its intentional disclosure of the Applicant's identity to his superiors within the JIU violated General Assembly resolution 48/218 B, Administrative Instruction ST/SGB/273, and OIOS internal rules and procedures. The decision to abolish the Applicant's post, the attempt to transfer the Applicant out of the JIU, and the failure to assign the Applicant any work were in fact disguised disciplinary measures intended to punish the Applicant.

3. The denial of the Applicant's request to be represented before the JAB by competent, external counsel of his own choosing on an extraordinary *pro hac vice* basis, is in direct contravention of Article 2, 8, 10, 11, 12 and 19 of the Universal Declaration on Human Rights, Articles 14, 19 and 26 of the International Covenant on Political and Civil Rights, and Article 6 of the Declaration of Basic Principles of Justice for Victims of Crimes and Abuse of Power. Such violations must therefore render UN staff rules 110.4 and 111.2 (i) null and void.

4. The failure of the Administration to advise the Applicant of its reasons for seeking the Applicant's transfer, and selecting the Applicant's post (from a total of three P-5 posts within the JIU) for abolition violated his rights of due process.

5. His personal and professional reputation was severely harmed by the incessant defamation of the JIU Executive Secretary.

6. The recommendation of the JAB was tainted by prejudice, mistakes of fact, errors of law, procedural irregularities, defamatory statements against the Applicant, and erroneous conclusions, and has caused him great mental and physical injury.

Whereas the Respondent's principal contentions are:

1. The decision to abolish the P-5 post encumbered by the Applicant was not flawed by procedural irregularities.

2. The abolition of the Applicant's post was neither motivated by prejudice on the part of the Executive Secretary nor constituted a disguised disciplinary measure or retaliation for the Applicant's report to OIOS.

3. The Administration complied with the JAB's recommendation that it find a special assignment for the Applicant until the date of his statutory retirement.

4. The bulk of the Applicant's arguments and pleas are not properly before the Tribunal and should therefore not be considered.

The Tribunal, having deliberated from 2 to 26 July 2001, now pronounces the following judgement:

I. In this case, the main issue for consideration is whether the administrative decision to abolish the post held by the Applicant violated his rights.

II. The Tribunal finds no adequate evidence that the decision to abolish the P-5 post held by the Applicant was a disguised disciplinary measure of any kind. Although the Applicant makes many allegations about the treatment he received from the Administration, he fails to substantiate such allegations.

In a memorandum dated 24 June 1996, the Chairman of the JIU sent the "Report of the Troika" to the Inspectors. He noted that the Troika had considered the questions of "both

responding in a positive way to the request [for] projected savings for 1997 ... and to the need for concrete measures to strengthen the JIU secretariat as mandated by several General Assembly resolutions ..., while solving certain difficulties the Unit [was] facing with some individual staff members". Attached to the memorandum were a number of proposals, including "the lateral transfer, preferably by exchange of staff of two P-5 Senior Research Officers within the UN system."

The Tribunal notes that this appears to be the only document in which "difficulties" in the Unit are mentioned, but that this does not constitute sufficient evidence to substantiate the Applicant's case. In that memorandum, it is clearly stated that the projected savings were mandated by the General Assembly, and that this was the overriding consideration. Further, the fact that the implementation of this organizational measure would incidentally help in problem-solving elsewhere within the service is not supportive of the Applicant's case. The nature of the "difficulties" within the Unit is never elaborated upon, nor explicitly connected in any way with the Applicant or any other particular person. Finally, in identifying a P-5 post for abolition, as is evident from the memorandum of the Executive Secretary of 6 October 1997, the Administration conducted discussions with all three P-5 staff members in the Unit, not only with the Applicant.

III. The Tribunal also finds that the Applicant failed to provide evidence that the abolition of his post was in retaliation for his having sent a report to OIOS, given that the attempts to transfer him predated the submission of that report. Moreover there is no evidence that that report was disclosed by the Under-Secretary-General for Internal Oversight Services to the Executive Secretary of the JIU.

In addition, an anonymous five-page memorandum was sent to the Executive Secretary of the JIU, and copied to several other UN officials, on 7 November 1996. It is reasonable to assume that the Applicant was the author of this memorandum as, the following day, he cited it in his letter to the Investigation Section, OIOS. However, the Tribunal notes that no action was taken against the Applicant in this regard.

IV. In accordance with the cost-saving proposals, one P-5 post had to be abolished. The Tribunal notes that, in carrying out this cost-saving, the Administration respected all the

pertinent rules and procedures. No matter what the motives underlying the decision to abolish the post might have been, the decision was upheld by a series of collegial bodies. Thus the procedure followed by the Administration safeguarded the objectivity of the decision. It is noteworthy that the JAB concluded that "[w]hile the Appellant's statutory rights were safeguarded, the interest of the Organization was disregarded".

As for the decision by the Administration to abolish the Applicant's post, this fell entirely within its discretionary powers. The Applicant has not adduced any satisfactory evidence that this decision was motivated by prejudice or other extraneous factors.

V. The Tribunal finds that the Administration made every possible effort to find another suitable post for the Applicant in accordance with the Staff Rules. There is evidence that the Applicant was offered various options: transfers; early retirement; or, a P-4 post with grade and salary protection. The Applicant rejected all the offers made.

Ultimately, the Secretary-General agreed with the recommendation of the JAB and offered the Applicant a special assignment until his statutory retirement. Pursuant to the recommendations of the JAB, the Director, Division of Administration, UNOG, proposed to the Applicant various assignments in Geneva, which were commensurate with his level and experience.

Thus, the Tribunal is satisfied that the Administration fulfilled its obligations towards the Applicant in this regard.

VI. Finally, the Tribunal finds no evidence that the Applicant's rights of due process were violated. In particular, it finds that the decision to abolish the post encumbered by the Applicant was properly arrived at despite the fact that the Administration did not conduct a comparative review by departmental panel in accordance with the provisions of the Under-Secretary-General for Management's memorandum of 2 December 1997. This is self-evident, as the decision to abolish the specific P-5 post predated this memorandum, it having been identified as early as 24 October 1997, in a memorandum from the Executive Secretary, JIU, to the Director of Administration, UNOG.

VII. In view of the foregoing, the Tribunal rejects the Application in its entirety.

(Signatures)

Julio BARBOZA
Vice-President, presiding

Brigitte STERN
Member

Spyridon FLOGAITIS
Member

Geneva, 26 July 2001

Maritza STRUYVENBERG
Executive Secretary

United Nations **AT**

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ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 1008

Case No. 1047: LOH

Against: The Secretary-General of the United Nations

THE UNITED NATIONS ADMINISTRATIVE TRIBUNAL,

Composed of: Mr. Julio Barboza, First Vice-President, presiding; Mr. Kevin Haugh, Second Vice-President; Mr. Omer Yousif Bireedo;

Whereas at the request of Keng Aun Loh, a former staff member of the United Nations, the President of the Tribunal, with the agreement of the Respondent, extended to 31 July and 31 October 1998 the time-limit for the filing of an application with the Tribunal;

Whereas, on 27 October 1998, the Applicant filed an Application requesting the Tribunal:

> "(a) ...[T]o observe that the Joint Appeals Board in its Report ... had decisively established the failure of the Secretary-General to abide by the procedures on promotion of staff members laid down by the General Assembly, the Secretary-General and the jurisprudence of the Administrative Tribunal, when the Secretary-General implemented the promotion of another staff member (...) to the D-1 ... thereby causing direct and substantial damage to the career of the Applicant. The Tribunal will also note that the Secretary-General '... acknowledges the irregularities which occurred in the filling of the posts in issue ... He has decided to accept the recommendation of the Panel regarding compensation ...' (...)

(b) ... [T]o redress the ineffectual, insufficient and inappropriate compensation that the Joint Appeals Board had recommended in its Report ...

(c) The Applicant respectfully further requests the Tribunal to order the Secretary-General:

(1) To promote the Applicant to the post [in question] retroactive to October 1994 ...

(2) In the event that the Secretary-General decides to pay compensation rather than effect retroactive promotion to the D-1 level, the Applicant requests the Tribunal to fix compensation commensurate to the damages caused to the Applicant's career and pension ... Interest is to be added to the compensation of the total sum for the period until the judgement of the Tribunal is delivered.

(d) ...[T]o compensate him six months base salary for the denial of due process and for the failure to observe the binding legal obligation to give him priority consideration for promotion in a fair and full manner ...

(e) ...[T]o find the Organization culpable for the continued harassing treatment meted out to him from September 1995 and more particularly from March 1996 until he retired ... The Tribunal is requested to award the Applicant seven months base salary corresponding to the period of extreme harassment.

(f) The Applicant, mindful of the fact that actions and decisions taken by senior officials in the name of the Secretary-General might in fact have been taken without the latter having been given all the facts of the case, respectfully requests the Tribunal to invoke the financial rule 114.1 and staff rule 112.3 so that such officials be held accountable for their actions and decision which they knew were contrary to the proper management and administration of resources, and so that the amount of the compensation paid to the Applicant may eventually be recovered from those officials ...

(g) ... [T]o order the Secretary-General to issue an amendment to the Official document of the General Assembly ***List of Staff of the United Nations Secretariat*** as of 31 August 1996, Report of the Secretary-General, ST/ADM/R.49, wherein the name of the Applicant was deliberately omitted even though he was still a staff member until 30 September 1996. [...]

(h) ...[T]o order the Respondent to produce ... documents ..."

Whereas the Respondent filed his Answer on 29 August 2000;

Whereas, on 29 September 2000, the Applicant submitted Written Observations as well as an amended plea which read as follows:

> "**Plea (d) to be amended as follows:**
>
> ... Consequently, the Applicant respectfully requests the Tribunal to order the Secretary-General to compensate him **proportionately with respect to the Judgement No. 914, paras. VIII, IX and X of the judgement of the Administrative Tribunal** for the denial of due process and for the failure to observe the binding legal obligation to give him priority consideration for promotion in a fair and full manner. ... **The Applicant further requests the Tribunal to add interest to the amounts awarded from the date of Judgement [No.] 914 until judgement is rendered in this application in fairness to the Applicant owing to the prolonged and undue delay by the Respondent.**"

Whereas the Respondent on 11 January 2001 submitted comments on the Applicant's written observations, and, on 15 February 2001, the Applicant submitted further comments and a request for production of additional documents;

Whereas on 7 June 2001, the Applicant submitted a number of documents;

Whereas the facts in the case are as follows:

The Applicant entered the service of the Organization on 26 June 1969 as a Records Management Officer at the P-2 level in the Registry Section, Communications, Archives and Record Service, Office of General Services, on a probationary appointment. His appointment was made permanent on 1 July 1971. He was subsequently transferred and promoted several times until 2 November 1992, when he was re-assigned with his P-5 post to the Professional Staffing Service, as its Officer-in-Charge. The Applicant replaced a D-1 staff member who was Chief of the Professional Staffing Service and Deputy Director of the Recruitment and Placement Division, Office of Human Resources Management (OHRM).

On 27 May 1994, the Secretary-General proposed that the post of Chief, Professional Staffing Service, be reclassified from the P-5 to the D-1 level which was approved by the General Assembly. On 14 July 1994, the Director of Personnel issued an inter-office memorandum on the procedure to be used when filling reclassified posts. On 9 November 1994, the Assistant Secretary-General, OHRM, wrote to The Legal Counsel, that, "as regards

encumbered posts reclassified in the 1994-1995 budget, we review each case on its merits and apply flexibility, particularly when the incumbent has discharged higher level functions for more than a year".

On 31 March 1995, the Assistant Secretary-General, OHRM, met with the Applicant and asked him to take early retirement effective 30 June 1995. The Applicant declined the offer. On 11 May 1995, the Director, Recruitment and Placement Division, offered the Applicant an agreed termination, which he also declined. For the period of June through August 1995, the Applicant's responsibilities were extended as he was made Officer-in-Charge of the General Service Staffing Section, OHRM.

On 29 February 1996, the Director, Recruitment and Placement Division, informed the Applicant that his post had been proposed for abolition. On 12 March 1996, the Assistant Secretary-General, OHRM, asked the Applicant to consider a new offer of agreed termination, effective 30 April 1996, which offer the Applicant refused on 26 March 1996.

In a memorandum dated 22 March 1996, the Assistant Secretary-General, OHRM announced the lateral transfer of a D-1 staff member to the post of Deputy Director of the Specialist Services Division and Chief, Staff Development Services, OHRM. He also announced the appointment of a P-5 staff member to the new D-1 position of Chief, Common Systems and Specialist Services, OHRM, and her promotion to that level. This was subsequently confirmed on 16 April 1996, in information circular ST/IC/1996/26.

Also on 16 April 1996, the Assistant Secretary-General, OHRM, informed the Applicant that he was recommending that the Applicant be assigned to the Economic Commission for Africa (ECA) as Chief of Personnel. On 17 May 1996, the Assistant Secretary-General, OHRM, confirmed his assignment to ECA from 17 June 1996 until his retirement.

On 7 June 1996, the Applicant wrote to the Secretary-General seeking review of the decision to promote another staff member to the D-1 position without first circulating a vacancy announcement. The same day, he also submitted a request for suspension of action on his assignment to ECA to the Joint Appeals Board (JAB). The JAB held an oral hearing on 12 June 1996, but before it could make its recommendation, the Applicant was instructed to apply for a visa for Ethiopia. He completed his visa forms the following day, 13 June 1996. That afternoon, the United Nations travel agency informed the Applicant that arrangements had been made for

his departure to Addis Ababa at 9 a.m. the next day, *i.e.* 14 June 1996. As the Applicant's passport was being renewed and his visa had yet to be issued, he asked that his departure be delayed until 18 June 1996.

Also on 13 June 1996, the Applicant wrote to the Director, Operational Services Division, OHRM, informing him that the Medical Service had not cleared him for an assignment to Addis Ababa. On 14 June 1996, the Medical Officer who had considered the Applicant's case and approved four weeks medical leave informed the Applicant that the Assistant Secretary-General, OHRM, had telephoned her at home and, as a result, his initial medical leave had been reduced to two weeks.

On 14 June 1996, the Joint Appeals Board (JAB) recommended suspension of action. According to the JAB, "it would appear that extraneous factors had affected the contested decision ...Given the nature of the assignment envisaged for the [Applicant], especially the fact that there seemed to exist no definite plan regarding his future duties, he would find himself in a very demeaning and damaging situation".

On 18 June 1996, the Officer-in-Charge, Department of Administration and Management, advised the Applicant of the JAB's recommendation but informed him that his request for suspension of action was moot due to the his medical leave, and thus the Secretary-General had decided to take no further action.

On 26 July 1996, the Applicant lodged an appeal with the JAB. The Applicant's certified medical leave was extended until 26 August 1996, and he retired on 30 September 1996. The JAB adopted its report on 16 October 1997. Its considerations and recommendation read as follows:

> "***Considerations***
>
> 69. The Panel first considered the question of the circulation of vacancy announcements for the ... D-1 posts. In that respect, the Panel observed that in a number of resolutions the General Assembly had directed that the Administration should announce 'all existing vacancies' (resolution 33/143 ...), and further required that 'Vacancy announcements for all posts shall be issued without delay as soon as vacancies are known' (resolution 35/210 ...). ...
>
> 70. The Panel observed that the Representative of the Secretary-General contended that the two D-1 posts had to be filled on an urgent basis to meet the exigencies of the

service resulting from the recent restructuring, and that 'OHRM simply could not afford the unavoidable delay of 4 to 6 months that would have resulted from announcing these vacancies'. In that respect, the Panel noted that the Administrative Tribunal had expressed the view, in its Judgement No. 362, *Williamson*, that a waiver of the vacancy announcement 'might be justified in the light of the responsibilities of the Organization under the Charter in an extraordinary emergency situation, for example, a peacekeeping or natural disaster relief operation.' The Panel did not consider that the decision to proceed with the restructuring referred to in the reply of the Representative of the Secretary-General to the appeal created 'an extraordinary emergency situation' within the meaning of the above-mentioned judgement, and therefore justified the non-distribution of vacancy announcements as mandated by [administrative instruction] ST/AI/390 [of 15 November 1993].

71. The Panel then observed that the Appellant had complained that [he] had not been fully and fairly considered for either D-1 position. ... In that respect, the Panel noted that, in its Judgement No. 362, *Williamson*, the Administrative Tribunal had stated, *inter alia*, [that] 'the Administration must be able to make at least a minimal showing that the staff member's statutory right was honoured in good faith in that the Administration gave the "fullest regard" to it,' and had ruled, in its Judgement No. 447, *Abbas*, that the burden of proof of having given consideration was on the Respondent ...

72. In the present case, the Panel found that except for the assertion that the [Assistant Secretary-General] ASG/OHRM was familiar with the qualifications, merit and experience of all his senior staff at the P-5 level and above and had considered all P-5 candidates in OHRM, there was no evidence of any merit that the Appellant had been properly considered. ... In the circumstances, doubts persisted that the Appellant had been accorded due process and that, in any event, the required degree of consideration had been given to [him].

73. The Panel considered, however, that even if the Appellant had been given full consideration, nothing indicated that [he] would have automatically been selected for one of the posts. It was therefore difficult for the Panel to entertain any claim on that account.

74. ... [T]he Panel ... felt that the Appellant must be compensated as a consequence of the failure of the Administration to abide by the procedures laid down by the General Assembly, the Administrative Tribunal and the Secretary-General.

Recommendation

75. The Panel *unanimously recommends* that because of that failure the ... Appellant [is] entitled to compensation. It unanimously agrees to recommend that the amount of compensation for [the] Appellant should be equal to two months' base salary at the time the two posts mentioned in [the Assistant Secretary-General for Human Resources Management's] memorandum of 22 March 1996 had been filled. In

addition, the Panel *recommends unanimously* that the Appellant ... should receive an additional month's salary in compensation because of the aggravating circumstances surrounding the denial to him of the opportunity to receive full and fair consideration for the vacant post for which he was eligible, namely, his removal from the post he had encumbered and the attempt to transfer him, when he was close to retirement, to a post in the field."

On 30 January 1998, the Under-Secretary-General for Management transmitted a copy of the JAB report to the Applicant and informed him as follows:

"...

The Secretary-General ... has taken note of the findings of the Panel that the non-distribution of the vacancy announcements for the posts in issue was not justified by the circumstances and that you did not receive the required degree of consideration for these posts. He has also noted the Panel's statement that, even if you had been given full consideration, nothing indicated that you would have automatically been selected for one of the posts. He has further noted the Panel's determination that there were aggravating circumstances surrounding your case.

The Secretary-General acknowledges the irregularities which occurred in the filling of the posts in issue and has taken note of the Panel's view that compensation be awarded. He has decided to accept the recommendation of the Panel regarding compensation and, accordingly, has decided that you [should] receive compensation in the amount of three months' net base salary, calculated as of 25 March 1996, the date the two posts in issue were filled.

..."

On 27 October 1998, the Applicant filed the above-referenced Application with the Tribunal.

Whereas the Applicant's principal contentions are:

1. The Respondent failed to act in accordance with the administrative issuances which he himself had promulgated for the promotion of staff members; violated established procedures; and, exceeded his authority.

2. The Applicant had an acquired right to be considered for promotion in a full and fair manner.

3. The Applicant was entitled to be placed in another post before someone else was promoted to the post he encumbered.

4. The Applicant was entitled to have his latest performance evaluation report (PER) presented to the Appointments and Promotion Board (the APB).

5. The Respondent's actions were arbitrary and seriously damaged the Applicant's career and pension rights.

6. The Applicant's assignment to ECA was abuse of authority motivated by vindictiveness, harassment and prejudice.

7. The JAB erred in not considering the Applicant's incumbency and thus made recommendations which were not commensurate with the gravity of the injury suffered by the Applicant.

Whereas the Respondent's principal contentions are:

1. The need to fill the position in question on an urgent basis was necessitated by the exigencies of service. The failure to advertise the post did not prejudice the Applicant's chances for promotion.

2. The fact that the Applicant was the incumbent of the post in issue did not entitle him to any priority or preferential treatment as far as consideration for promotion was concerned.

3. An appeal against the Applicant's non-promotion in October 1994 is time-barred.

4. The decision to assign the Applicant to ECA did not violate his rights as it was within the discretionary authority of the Administration. Furthermore, as the assignment did not take place, the decision was never implemented.

5. The Applicant has been adequately compensated for the procedural irregularities in his case.

The Tribunal, having deliberated from 28 June to 26 July 2001, now pronounces the following judgement:

I. The instant case is similar to that decided in Judgement No. 914, *Gordon and Pelanne* (1999), which arose from the same basic facts. The Applicant complains that, notwithstanding the fact that the JAB granted him a higher amount of compensation than the other Applicants, the amount awarded was grossly insufficient and did not reflect all the circumstances of his case.

II. The Applicant encumbered a P-5 post which was upgraded to the D-1 level. He claims that the Administration was under a legal obligation to promote him to that new level, invoking the interoffice memoranda of 14 July and 9 November 1994 from the Director of Personnel and the Assistant Secretary-General, OHRM, respectively. The Tribunal cannot agree with that conclusion. The first of the above-mentioned memoranda extended the obligation of circulating vacancy announcements to posts which had been reclassified to a higher level and were to be filled on a long-term basis. The second memorandum reaffirmed that obligation but qualified it by asserting that the Administration could "review each case on its merits and apply flexibility, particularly when the incumbent has discharged the higher level functions for more than one year". In other words, both documents affirmed that, in certain instances, the Administration could act with flexibility and directly appoint the incumbent of the post, i.e. without circulating vacancy announcements. In the present case, the reverse occurred: the Applicant was not appointed by the Administration to fill the reclassified post in spite of being the incumbent. Therefore, while the documents quoted reaffirm the obligation of the Administration to circulate vacancy announcements, they do not in the least require the Administration to appoint an incumbent staff member to a reclassified post. The Administration had no such obligation.

III. The Tribunal recalls the situation as it was on 22 March 1996. On that date, the Assistant Secretary-General, OHRM, informed all Heads of Departments and Offices of the structural adjustment within OHRM and announced (a) that a staff member at the D-1 level was designated as Deputy Director of the Specialist Services Division and Chief, Staff Development Services, and (b) another staff member at the P-5 level was promoted to the D-1 level post of Chief, Common System and Specialist Services, which had been newly established. Vacancy announcements were circulated for neither post.

The Applicant contends that these decisions violated the relevant provisions of ST/AI/390 as well as the policy contained in the memoranda of 14 July and 9 November 1994. In particular, he asserts that "[t]he Assistant Secretary-General for HRM should either have had the Applicant promoted, being incumbent of the post according to the procedures he himself had established (...) or follow the procedure under ST/AI/390 by issuing a vacancy announcement to fill the post".

IV. The Respondent does not deny that the usual procedures were not followed in the filling of the two posts and even admits that there were irregularities. This was indicated in the Respondent's letter to the Applicant pursuant to the recommendation of the JAB, wherein "the Secretary-General acknowledge[d] the irregularities which occurred in the filling of the posts in issue" and granted compensation to the Applicant. However, the Respondent now contends that:

> "the vacancies in question were filled at the time of the restructuring of OHRM and the consequent need for OHRM to manage the deep budget cuts that were being effected as a result of [the] General Assembly adopting resolutions 50/214 and 50/215. All parts of OHRM had to be fully functional and managed during that crucial period of time. OHRM simply could not afford the unavoidable delay of 4 to 6 months that would have resulted from announcing these two vacancies and following the normal placement and promotion procedures. The urgent exigencies of service required that the two D-1 posts be filled on an expedited basis. This was done in the interest of the Organization."

V. The Respondent also alleges that "since the Applicant was a senior officer in OHRM and the [Assistant Secretary-General], OHRM, was well acquainted with his qualifications and experience, the failure to advertise the posts in question did not prejudice his chances for promotion". The Tribunal cannot but quote here a paragraph from *Gordon and Pelanne*:

> "The Applicants also point out that there is a certain irony in the Assistant Secretary-General for Human Resources Management writing in a memorandum of August 21, 1995 to the Director, Field Administration and Logistics Division

> that 'Missions are required to ensure the existence of suitable procedures to conduct their internal promotion review in a fair and objective manner', while at the same time committing irregularities in filling two D-1 posts at Headquarters, in his own department."

VI. The Tribunal also said in that Judgement that:

> "The JAB had already found that the urgency alleged by the Respondent was not of sufficient magnitude to overcome the need to issue a vacancy announcement in the light of the standard set by the Administrative Tribunal in its Judgement No 362, *Williamson* (1986). In *Williamson*, the Tribunal held that waiver of a vacancy announcement 'might be justified in the light of the responsibilities of the Organization under the Charter in an extraordinary emergency situation, for example, a peacekeeping or natural disaster relief operation'. The JAB concluded that the 'urgent exigencies' allegedly confronting OHRM did not constitute an 'extraordinary emergency situation' in accordance with the standard enunciated in *Williamson*."

This reasoning is applicable to the present case. The Tribunal believes that the following findings in *Gordon and Pelanne* are also pertinent:

> "The Tribunal agrees with the JAB that the urgency alleged by the Respondent to justify his actions was not so extraordinary in nature that the Administration could avoid the procedures that all staff members are entitled to expect. The Tribunal is satisfied that under the standard established in *Williamson*, no 'extraordinary emergency situation' existed that might have justified the suspension of proper procedures for promotion. The Tribunal is of the view that the Assistant Secretary-General for Human Resources Management could have found other ways of coping with the reorganization of his Department, without having to breach the procedures guaranteeing due process for the Applicant. If, as the Respondent claims, the allegedly 'urgent' circumstances could be considered an 'extraordinary emergency situation' justifying a departure from the rules, such an excuse could be invoked so frequently that the rules would seldom be followed. Such a result would lead to a complete breakdown of the promotion system, would severely affect career development and would lead to wholesale favouritism. Consequently, staff morale would suffer, to say the least."

VII. In his request for compensation, the Applicant places great emphasis on the quality of his incumbency in the D-1 post. The Tribunal has already expressed its view that there is no

legal obligation for the Administration to appoint a staff member who is incumbent to a post, but even the Respondent acknowledges that "the Applicant was entitled to full and fair consideration for promotion". The Tribunal is satisfied that this obligation is even stricter regarding a staff member who is an incumbent with more than one year in the post. In addition, while it may fall short of being a legal obligation to appoint an incumbent in all cases, it is clear that under the applicable Rules, incumbents are entitled to some special consideration. This is apparent in the above-mentioned memoranda of 14 July and 9 November 1994 and in view of the Applicant's contention - never denied by the Respondent - that the Administration appointed incumbents in 34 of the 35 available vacancies in the same promotion exercise.

The Tribunal finds that it is obvious that the Administration should have explained why the Applicant was passed over in favour of another staff member aspiring to the same post. It finds it equally obvious, however, that the Applicant did not receive "full and fair consideration" and that the APB was not even given the necessary elements for it to consider his candidacy, in particular the Applicant's PER, which had not been completed when the D-1 post was filled. The Tribunal considers that all the evidence points to a conclusion that the Administration did everything possible to take the Applicant out of the picture.

VIII. The Respondent submits, in harmony with the JAB's conclusions, that "even if [the Applicant] had been given full consideration, nothing indicated that [he] would have been selected for the post". The Tribunal must repeat here what it said in *Gordon and Pelanne* wherein it found that reasoning "unpersuasive":

> "As a result of the improper procedure used by the Respondent, the Applicants were automatically excluded from an opportunity to compete for the posts. The Respondent's disregard of proper procedures was detrimental to the Applicants' career development and caused the frustration and mental anguish of not being considered for posts for which they might have been qualified. Moreover, the Tribunal cannot take lightly the violation of due process by the Respondent, particularly when ST/AI/390 (superseded in 1996 by ST/AI/413) was enacted by him in order to prevent the very practices to which he resorted in this case. The Tribunal finds that in light of the extraordinary circumstances described above, the Applicants are entitled to a larger amount of compensation than was recommended by the JAB and accepted by the Respondent."

IX. The Tribunal is satisfied that the quality of the Applicant's incumbency was an aggravating factor in his case. Even more egregious, however, was the harassment and manipulation to which the Applicant was submitted.

The Respondent adopted a "carrot and stick" policy towards the Applicant as soon as it was decided to appoint other staff members to the D-1 posts. First, the Applicant was offered an agreed separation with favourable terms. When that approach failed, however, the Applicant was subjected to indignity and harassment. He was made to move office on short notice twice, the second time to a room bare other than for a desk. Finally, on 16 May 1996, he was informed that he was to be assigned to ECA in Addis Ababa until his retirement, which was less than five months away. The Applicant submitted a request for suspension of action on this assignment to the JAB, which held an oral hearing on 12 June 1996, but before it could issue its recommendation the Applicant was instructed to apply for a visa for Ethiopia. On 13 June 1996, the United Nations travel agency informed the Applicant that arrangements had been made for his departure to Addis Ababa at 9 a.m. the next day, *i.e.* 14 June 1996. The Applicant informed the Director, Operational Services Division, OHRM, that the United Nations Medical Service had not cleared him for an assignment to Addis Ababa. On 14 June 1996, the Medical Officer who had considered the Applicant's case and approved four weeks medical leave informed the Applicant that the Assistant Secretary-General, OHRM, had telephoned her at home concerning the Applicant, and that his initial medical leave had been reduced to two weeks. The Applicant's certified medical leave commenced that day, and was subsequently extended. He did not return to work until 26 August 1996, and received no further assignments until his separation from service on 30 September 1996, upon his retirement at the age of sixty.

The Tribunal is appalled at this blatant harassment of the Applicant and, in light of all of these aggravating factors, has decided to award the Applicant 27 months net base salary, which amounts to greater compensation than the two years net base salary which is normally the maximum amount awarded by the Tribunal in accordance with the Statute. The Tribunal is satisfied that such an award is justified, as the harassment endured by the Applicant constitutes "exceptional circumstances" in accordance with Article 11 of the Statute and Rules of the

Tribunal. It notes that the JAB awarded the Applicant three months net base salary, 50 per cent more than the two months net base salary awarded to the Applicants in *Gordon and Pelanne*. The Tribunal agrees that such a percentage increase is justifiable under the circumstances and has done likewise. As the Tribunal awarded the Applicants in *Gordon and Pelanne* compensation of 18 months net base salary, a 50 per cent increase thereof results in an award of 27 months net base salary for the Applicant.

X. The Tribunal notes that the Applicant has requested that the 1996 edition of the Official Document of the General Assembly entitled "List of Staff of the United Nations Secretariat", ST/ADM/R.49, be amended to include his name which, he says, had been omitted even though he was still a serving staff member. The Tribunal is sympathetic to the slight felt by the Applicant, but considers that ordering the re-publication of a document which has been obsolete for several years is unjustifiably expensive and would serve no useful purpose. The Tribunal finds that this Judgement should be sufficient satisfaction for the slight endured.

XI. As in *Gordon and Pelanne*, the Tribunal feels compelled to add that this is such a serious case of maladministration that consideration should be given to invoking staff rule 112.3, which provides as follows:

> "Any staff member may be required to reimburse the United Nations either partially or in full for any financial loss suffered by the United Nations as a result of the staff member's negligence or of his or her having violated any regulation, rule or administrative instruction."

XII. In view of the foregoing, the Tribunal:

(i) Orders the Respondent to pay the Applicant compensation in the amount of 27 months of his net base salary, at the rate in effect on the date of his separation from service; and,

(ii) Rejects all other pleas.

(Signatures)

Julio BARBOZA
First Vice-President, presiding

Kevin HAUGH
Second Vice-President

Omer Yousif BIREEDO
Member

Geneva, 26 July 2001

Maritza STRUYVENBERG
Executive Secretary

United Nations **AT**

Administrative Tribunal

Distr.
LIMITED

AT/DEC/1009
26 July 2001

ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 1009

Case No. 1118: MAKIL

Against: The Secretary-General of the United Nations

THE UNITED NATIONS ADMINISTRATIVE TRIBUNAL,

Composed of: Mr. Kevin Haugh, Vice-President, presiding; Mr. Omer Yousif Bireedo; Mr. Spyridon Flogaitis;

Whereas at the request of Raju Makil, a former staff member of the International Trade Centre (ITC), the President of the Tribunal, with the agreement of the Respondent, extended to 31 December 1999 the time-limit for the filing of an application with the Tribunal;

Whereas, on 23 December 1999, the Applicant filed an Application containing pleas which read as follows:

"**II. Pleas**

Request for Discovery and Witnesses

8. ... [T]he Applicant respectfully requests the [United Nations Administrative Tribunal (UNAT)] to forthwith forward to the Respondent [Requests for Production of Documents, Written Interrogatories and Requests for Admission of Facts] ...

...

11. The Applicant also requests that either a stenographic or audio-tape record of all proceedings before the UNAT, including the examination of witnesses, if any, or consideration of other evidence, be undertaken and made available to the parties hereto.

Redress Sought

14. The Applicant respectfully requests that the UNAT order the Secretary-General to provide further redress for [the] Applicant's treatment by [[the] Respondent, as detailed below:

- That the impugned administrative decision of the ... Executive Director [, ITC,] to place the Applicant on special leave on 2 December 1996 be quashed with full retroactive effect as if said decision was never issued;

- That the Applicant be forthwith restored in all respects to his post and position within ... ITC prior to 2 December 1996 with full retroactive effect, and full restoration of all benefits and emoluments, through his ultimate date of retirement which was 31 May 1997;

- That the ... Executive Director be instructed to issue a countermanding memorandum to his defamatory memorandum of 2 December 1996, stating that the Applicant was reintegrated in full into his position as Deputy Executive Director, ITC, that said memorandum of 2 December 1996 in no way was intended to reflect or comment on the Applicant's performance or person, and further, that such countermanding memorandum contain an express and unconditional apology from the Executive Director to the Applicant for any damage or injury such defamatory memorandum of 2 December 1996 may have caused him, admitting that said 2 December memorandum was indeed defamatory;

- That the Applicant be awarded the sum of three hundred thousand (US$300,000) dollars (an amount equal to approximately two years of the Applicant's final salary) in compensation for the actual and moral injury the Applicant suffered as a result of the impugned decision and subsequent actions incident thereto;

- That the Applicant be reimbursed by ... ITC the sum of twenty five thousand (US$25,000) dollars for his expenses and other costs occasioned by this appeal;

- That the Tribunal award the Applicant a sum it deems appropriate in compensation for the inexplicable delay of the JAB in considering the subject case and issuing its recommendation, as well as for the [Secretary-General]'s failure to respond to the Applicant's original request for administrative review, and for the JAB [Joint Appeals Board]'s failure to allow the Applicant to be

represented before the JAB by counsel of his own choosing on a *pro hac vice* basis;

- That the Tribunal award interest on any sums recommended hereunder at the rate of six (6 %) per cent per annum, from 2 December 1996 through the date of satisfaction of any judgement hereunder;

- Referral of the allegations raised by the Applicant above to an independent and *ad hoc* investigative and disciplinary committee (...) in particular the seeming violation by the ... Executive Director and the UNOG Director of Personnel of General Assembly resolution 51/226, which calls for sanctions against programme managers who mismanage staff and willfully neglect or disregard rules and procedures (...);

- In the event the [Secretary-General] fails to initiate such a disciplinary investigation, and order lifting the functional privileges and immunities of [the Executive Director, ITC,] and [the Chief, Personnel Service, UNOG,] so that the Applicant may seek redress from them directly in any applicable national court of his choosing; and

- Such other relief as the Tribunal deems just, fair and equitable under the foregoing circumstances."

Whereas the Respondent filed his Answer on 28 February 2001;

Whereas the Applicant filed Written Observations on 29 April 2000;

Whereas the facts in the case are as follows:

The Applicant joined the United Nations on 12 August 1968 as an Economic Affairs Officer in ITC under a monthly short-term contract. On 1 January 1969, he was granted a fixed-term appointment for two years as a Research Economist P-2 level, step VII. After a series of promotions, the Applicant was granted a permanent appointment, effective 1 January 1975. On 1 January 1978, the Applicant was promoted to the P-5 level and, on 1 January 1983, to the D-1 level as Director, Division of Personnel Management. He was designated Officer-in-Charge, ITC, on 1 May 1992 and granted a special post allowance to the D-2 level.

Effective 12 June 1994, he was promoted to Deputy Executive Director, ITC, at the D-2 level. On that same date, the newly appointed Executive Director, ITC, assumed his post. On 2 December 1996, the Applicant was placed on special leave with full pay (SLWFP) through 31 May 1997 at which time he retired.

During his service with ITC, the Applicant received four performance evaluations covering the period from August 1968 to April 1981. The Applicant received overall ratings from "very good" to an "exceptionally competent staff member of unusual merit".

Sometime during late summer or early fall, of 1996, the Executive Director met privately with the Applicant and allegedly warned him that he needed to change his attitude towards the internal reform process instituted by the Executive Director. No record exists of this meeting. At a Director's meeting on 30 October 1996, the Executive Director requested that "henceforth, the [Applicant] should chair interdivisional meetings to discuss the final selection of project proposals for submission to individual donors".

During the last week of October 1996, a team from the Office of Internal Oversight Services (OIOS) visited the offices of ITC in Geneva in order to review ITC's programme of work and administrative practices. The OIOS Report issued as a result of that visit was not favourable to the ITC management, emphasizing a lack of delegation of authority, responsibility and accountability.

By letter of 2 December 1996, the Executive Director informed the Applicant as follows:

> "... Regretfully, your lack of commitment and support in implementing the reform ... and our increasingly divergent views and consequent difficulties to work as a management team, have led me to conclude that your involvement in the process would constitute a serious impediment to the success of the overall exercise.
>
> I have therefore decided, in conformity with the authority delegated to me, to place you on special leave with full pay effective immediately, until the date of your retirement, i.e. 31 May 1997."

On the same day, the Executive Director sent a memorandum to all ITC staff informing them of his decision.

Also on 2 December 1996, the Applicant informed the Executive Director that he would appeal the decision and required "full access to all relevant files and papers".

In a letter dated 4 December 1996, the Executive Director advised the Applicant that his access to documentation was limited to his official status file and that he was requested to

vacate his office by noon the next day, 5 December 1996, "as [he would] not be performing official functions during the period of SWLFP and as he had been given the opportunity to assemble [his] personal items since Monday, 2 December".

On 9 December 1996, the Assistant Secretary-General of OHRM sent the Executive Director a fax supporting his actions and urging him to "ensure that the rights and entitlements of [the Applicant would be] fully protected."

On 26 January 1997, the Applicant wrote to the Secretary-General requesting a review of the decision to place him on SLWFP, and on 9 May 1997, the Applicant lodged an appeal with the Geneva Joint Appeals Board (JAB).

The JAB adopted its report on 11 June 1999. Its considerations, conclusions and recommendation read, in part, as follows:

> **"Considerations**
>
> 76. The Panel moreover noticed that after warning the Appellant ... the Executive Director gave him an additional responsibility. Indeed, on 30 October 1996, "the Executive Director requested that "henceforth, the [Applicant] should chair interdivisional meetings to discuss the final selection of project proposals for submission to individual donors". In the Panel's view, there is a striking contradiction between these two successive actions of the Executive Director, which does not support the abrupt placement of the Appellant on SLWFP.
>
> ...
>
> **Conclusions and Recommendation**
>
> 87. ..., the Panel **concludes** that the decision to place the Appellant on SLWFP [special leave with full pay] was well founded in law and within the limits of the discretion of the Executive Director of ITC.
>
> 88. The Panel **concludes**, nevertheless, that the contested decision was tainted by the following shortcomings: (i) the contradictory attitude of the Executive Director after the meeting during which the Appellant was warned of the need to change his attitude and the abruptness of the notification of the SLWFP; (ii) the improper use of the SLWFP; (iii) the way ITC staff was informed about the decision; and (iv) the circumstances under which the Appellant was made to vacate his office.

89. The Panel therefore **concludes** that, while the Appellant incurred no material loss, he did suffer moral injury.

90. In the Panel's view, this report and its acknowledgement of the moral injury suffered by the Appellant constitute the moral compensation called for. In addition, the Panel **recommends** that the Appellant be awarded token damages in the amount of one United States dollar."

On 7 September 1999, the Under-Secretary-General for Management transmitted a copy of the JAB report to the Applicant and informed him as follows:

"...

The Secretary-General ... has taken note of, and agrees with, the Board's conclusion that the decision to place you on SLWFP was well founded in law and within the limits of the discretion of the Executive Director of ITC.

However, the Board also concluded that the contested decision was tainted by a number of shortcomings, as a result of which you incurred no material loss but suffered moral injury. ...

The Secretary-General is not in agreement with most of the shortcomings identified by the Board. With respect to the alleged 'contradictory attitude' of the Executive Director after the meeting during which you were warned of the need to change your attitude, the Secretary-General notes that, contrary to the Board's understanding, you were not given an additional responsibility in October 1996; rather, you were reminded of your responsibilities as the Deputy Executive Director. Accordingly, no 'striking contradiction' exists between the Executive Secretary's reminder to you and his subsequent decision to place you on SLWPF. The Secretary-General also does not agree with the Board that the SLWFP was used improperly as a bridging measure until your retirement and that ITC should have searched for a special assignment for you. Having regard to your rank and imminent retirement, the contested decision was appropriate and was further the result of a cost-benefit analysis to ensure effective implementation of ITC's reform. The Secretary-General takes note of the Board's remark that the notification to the ITC staff of your placement on SLWFP should have contained an explanation for that decision, but he does not agree that the absence of such an explanation is more considerate to, and respectful of, you than a communication to everyone in ITC of the reasons for placing you on SLWFP. However, the Secretary-General acknowledges the Board's concern about the circumstances under which you were made to vacate your office and has decided to accept the Board's recommendation for one US dollar token damages.

..."

On 23 December 1999, the Applicant filed the above-referenced Application with the Tribunal.

Whereas the Applicant's principal contentions are:

1. The decision of the Executive Director to place unilaterally the Applicant on SLWFP less than six months prior to the applicant's statutory retirement date, without the Applicant's consent or consultation, without notice or warning to the Applicant, and without stating lawful reasons for such action, was an egregious violation of the Applicant's rights to due process.

2. The decision of the Executive Director to place the Applicant on SLWFP was *ultra vires*, arbitrary, and amounted to a thinly disguised disciplinary measure taken without resort to the procedures of staff rule 110.1 et seq.

3. The decision to place the Applicant on SLWFP and his subsequent actions incident thereto constituted defamation of the Applicant's personal and professional good name and reputation, causing him grave moral injury.

4. The refusal of the JAB to allow the Applicant to be represented by qualified counsel of his own choosing on a *pro hac vice* basis was a violation of the Applicant's rights of due process.

Whereas the Respondent's principal contentions are:

1. The decision to place the Applicant on SLWFP constituted a proper exercise of the Executive Director's discretion and was not vitiated by improper motives or extraneous factors.

2. The refusal of the JAB to allow the Applicant to be represented by counsel of his own choosing was not a violation of his rights.

3. The Applicant is not entitled to his legal costs.

The Tribunal, having deliberated from 2 to 26 July 2001, now pronounces the following judgement:

I. It does not appear to the Tribunal that it is necessary or appropriate that it should order the Respondent to respond to the Applicant's Interrogatories or Request for Discovery or to the Notice requiring the Admission of Facts before it deals within this Application. The Tribunal considers that it has sufficient documentation to enable it to consider and determine this Application and, accordingly, it declines to order the Respondent to make Discovery of Documents or to reply to the Interrogatories or to the Notice to Admit Facts.

II Likewise the Tribunal does not consider it necessary to hear oral evidence to enable it to consider and determine this Application and accordingly it declines to order the taking of oral evidence, if such an Application was ever intended. The Tribunal declines to order that any record to be made or published concerning its deliberations. Such deliberations are irrelevant to the parties. What is relevant is its decision or judgement. Accordingly, the Applicant's request in this regard is denied.

III. The Applicant submits that "the hearing of the present appeal before the Tribunal is *de novo*, the so called findings of the JAB have no legal weight or priority" and submits that "unless the Respondent is able to offer concrete, demonstrative facts to the contrary of those asserted in the application (which, in the Applicant's opinion the Respondent has failed to do in its [Answer]) the Tribunal has little choice but to accept the Applicant's factual assertions as controlling".

The Tribunal rejects this submission and finds that it demonstrates a misunderstanding or misstatement as to the nature and extent of the Tribunal's jurisdiction. The Statute of the Tribunal does not envisage that findings of fact upon which a decision of the Tribunal is reached would ordinarily or usually be made following the Tribunal's own investigations or upon facts found by the Tribunal itself. This is so because matters coming before the Tribunal arrive almost invariably after a preliminary investigation by a JDC or a JAB or like body which carries out investigations and makes findings of facts and then reports thereon. The exception to this general rule arises when the parties have no dispute as to the facts and the matter can be referred to the Tribunal in the first instance on the basis of "Agreed Facts", in accordance with article 7 of

the Statute. Where an application is submitted on the basis of such agreed facts and it transpires that sufficient facts have not been agreed as would enable the Tribunal to embark on a hearing and the making of a decision, the Tribunal will ordinarily refer such a case back to the parties to see if they can agree on sufficient facts or, in default, refer the matter to a JAB for a further investigation or fact finding, as was done for example in Judgement No. 902, *Macnaughton-Jones et al.* (1998).

IV. Accordingly, the Tribunal will ordinarily operate on facts as found by the JDC or JAB or other primary fact finding body, unless the Tribunal expresses reasons for not doing so, such as identifying a failure or insufficiency of evidence to justify the finding of fact allegedly made or where it identifies prejudice or perversity on the part of the said fact finding body or finds that it has been influenced in making that finding of fact by some extraneous or irrelevant matter. Unless such reasons are identified by the Tribunal, then facts as found by the JDC or the JAB will stand for the purposes of the Tribunal's deliberations. The Tribunal stresses that the above principles are applicable to findings of primary facts and have no bearing on the question of interpretation of documents or the drawing of inferences from primary facts. Such inferences may often be described as findings of secondary facts rather than findings of primary facts. This is because the Tribunal is in no way disadvantaged when compared to a preliminary fact finding body, be it a JDC, JAB or other such body in matters of that nature, whereas such body is usually best suited to making findings of primary facts, as it has seen and heard the witnesses. The Tribunal also emphasizes that it of course enjoys the power conferred by the Statute to embark on fact finding in appropriate cases. For instance, it enjoys the power to have oral hearings, albeit it exercises this power infrequently.

V. In the circumstances, it is not correct to say that the findings of fact made by a JAB have no legal weight or priority or that the assertions of fact made by the Applicant in his application must stand unless the Respondent establishes the contrary. This submission demonstrates a serious misunderstanding or misstatement as to the functions and jurisdiction of this Tribunal. For example, there is issue between the Applicant and the Executive Director of the ITC as to whether he had, prior to December 1996, verbally warned the Applicant that he, the

Executive Director, believed that the Applicant was not supporting the reforms planned, or remonstrated with the Applicant concerning his attitude and commitment towards those reforms and told him that his attitude and commitment would have to change. The Executive Director persuaded the JAB in these proceedings that at a meeting in late summer/early autumn 1996 he had so told the Applicant. This the Applicant denied and says that there was no prior warning or expression of dissatisfaction. It was for the JAB to resolve this credibility issue and it did so in favour of the Executive Director. In the proceedings before the Tribunal, the Applicant seeks to persuade the Tribunal that it should alter this finding of fact on the ground that the Executive Director's evidence is not credible and unsupported by either reference to such a meeting in the letter of December 1996 sent to the Applicant, or by a "Note for the file" or by other contemporaneous record. In the opinion of the Tribunal, this was an issue of fact pre-eminently and properly suitable for resolution by the JAB, having considered the evidence. The Tribunal considers that it ought to stand as the Applicant has failed to demonstrate either that the finding was not supported by evidence or that the evidence supporting it was false or was not worthy of belief.

VI. The Tribunal sees no reason why it should, as submitted by the Applicant, proceed on the assumption that the said finding was erroneous and accept the Applicant's assertion that no meeting had taken place, merely because the Applicant has made such an assertion and the Respondent has not been able to conclusively prove the contrary.

VII. The Respondent invokes staff regulation 5.2 and staff rule 105.2 (a) (i) as authority for placing the Applicant on SLWFP for a period of just six months before the date of his retirement. Staff regulation 5.2 speaks of the Secretary-General being empowered to authorise special leave in exceptional circumstances. The Tribunal considers that a true construction of this Regulation means that the Secretary-General may permit or allow special leave to be taken by a staff member who desires to take it, rather than empowering the Secretary-General to force it upon an unwilling staff member, as is the case in these proceedings.

VIII. The Tribunal considers that a very different interpretation arises in the case of the powers of the Secretary-General under staff rule 105.2 (a) (i) which speaks of a staff member being placed on SLWFP in exceptional cases at the initiative of the Secretary-General. The Tribunal is satisfied that there was cogent and credible evidence before the JAB such as allowed it to find that the Executive Director honestly believed that the Applicant was not properly supporting or progressing the implementation of the reforms, and to believe that their increasingly diverging views and consequent difficulties in working as a management team constituted an exceptional case which warranted placing the Applicant on SLWFP for the six months remaining until his retirement.

IX. What was being alleged and decided against the Applicant was that he was resistant to change and did not support a programme of change or reform which the ITC had decided should be implemented. This is not the same as actively engaging in misconduct, which could have led to disciplinary measures being taken against the Applicant, had there been a finding of misconduct. What was being criticised was his attitude and his alleged lack of support for the programme of change, not that he was actively or wilfully disobedient or seeking to sabotage the programme. The Applicant seeks to argue that, on the contrary, the Executive Director had some ulterior motive for his decision (i.e. a desire to make him a scapegoat for criticisms which had been made or which the Executive Director believed would be made, in a Report from OIOS, which was then investigating the ITC) or that the Executive Director malevolently and unreasonably sought to inflict a punishment on the Applicant.

X. The Applicant failed to offer any evidence in support of either theory or hypothesis. The Tribunal, of course, understands and accepts that it is always difficult for anybody to find evidence supporting this type of allegation, as those who conspire to commit unlawful and vengeful acts try not to leave a trail of evidence. Nonetheless, the circumstances of this particular relationship appear to the Tribunal to make this allegation unlikely. The Executive Director appears to have been historically well disposed to the Applicant. When the Executive Director was appointed he requested that the Applicant be appointed as his second-in-command.

He does not appear to have sought to undermine the Applicant. There is dispute as to whether the Executive Director imposed enhanced or extra duties on the Applicant or whether he merely exhorted him to perform whatever were already his duties. Either scenario suggests that the Executive Director was, until some months before December 1996, actively showing support for the Applicant, at least in some areas, rather than undermining his position. The JAB considered that this demonstrated a contradictory attitude on the part of the Executive Director. This is one point of view but, on the other hand, encouragement and increasing staff members' responsibilities or authority are well known ways of seeking to provide a spur to those that are considered to be slacking. In any event, the JAB was entitled to reject the Applicant's said contention and to find that the Executive Director acted in a *bona fide* manner and not with a base or ulterior motive, and the Tribunal sees no reason why this finding should be overturned.

XI. The Applicant complains that he was not afforded due process prior to the making and implementation of the Executive Director's decision to place him on SLWFP and to exclude him from his office. By this he means that he ought to have been afforded details of the allegations made against him, a hearing thereon and an opportunity of making his answer to those allegations and to make his case. The Tribunal accepts that the Applicant would have enjoyed such rights had allegations of misconduct, which might have led to disciplinary sanctions being taken against him, been contemplated. This was not the case. The Applicant occupied a crucial position within ITC and his cooperation and support were considered crucial in the implementation of the reform programme. The Tribunal accepts that, where the Executive Director was genuinely of the opinion that the Applicant's continuing occupation of the post would have stymied or handicapped the implementation of the reform programme, the Executive Director was entitled to consider that it was expedient, and in the interests of ITC, that the Applicant should be immediately placed on special leave and in consequence removed from his duties. Time would not have permitted an investigation or a hearing: It is probable that the Applicant would have reached retirement age before such an investigation could have been concluded. Accordingly, the Tribunal considers that the decision to place him on SLWFP was warranted and appropriate in the circumstances.

XII. In the course of his submissions, the Applicant refers to the Code of Conduct for International Civil Servants and quotes from paragraph 13 thereof. This paragraph deals with the entitlement of a staff member (in particular a junior one) to express his views, and in particular such views as may be opposed to the views of his superior officer(s), and encourages due recognition to the merits of those views. The Tribunal does not appreciate the relevance of those observations to the facts of the present case as the Applicant does not appear to contend that he had a legitimate or heartfelt opposition to the proposed reform programme or that he had just expressed his views. If the submission is designed or intended to suggest that where a staff member has a sincere or heartfelt view that a legitimate or lawful programme of reform is unwise, he is entitled to express his views then, of course, the Tribunal accepts the wisdom and correctness of the proposition. If, on the other hand, it is intended to submit that such an official is entitled to try to stymie or sabotage the implementation of a programme, then the Tribunal need hardly add, this submission is gravely misconceived.

XIII. The Applicant claims that he was denied due process in relation to the proceedings of the JAB in that he was denied the right to be represented in those proceedings by qualified counsel of his own choosing, and that he was restricted to representation from the category of persons identified by staff rule 111.2 (i). The Tribunal is satisfied that such category of persons is sufficiently wide that it would have permitted counsel not suffering from a conflict of interest to have been retained. In particular, the Tribunal rejects the notion that counsel who are, or have been, in the employ of the Organization are so besmirched or compromised that they should be deemed incapable of acting impartially and honestly. The Tribunal considers this submission gratuitously offensive and unwarranted. The Tribunal is satisfied that the category of persons is sufficiently wide that an applicant's right to due process is not denied by the application thereof.

Save as to the amount of compensation to be awarded to the Applicant for the precipitous expulsion from his office, the Tribunal is satisfied that the JAB's findings and recommendations are not irrational, inexplicable or unreasonable. The Tribunal is also satisfied that the Respondent's decisions pursuant to those findings and recommendations, again with the exception for the amount of compensation to be paid for the precipitous expulsion of the Applicant from his office, were reasonable and rational and were ones which he was entitled to

make. It was, in the view of the Tribunal, reasonable for the Executive Director to have abstained from reciting the reasons for putting the Applicant on special leave and for relieving him of his duties, as had he done otherwise the Applicant might then have complained that his reputation ought not have been so besmirched. It was a difficult decision to make. The Tribunal is, however, satisfied that no right of the Applicant was infringed by the manner in which the Executive Director's Notice to the staff was worded. In any event, insofar as the Applicant claims that this gives rise to a cause of action for defamation, the Tribunal is satisfied that it is not within its jurisdiction to hear or to determine such claims. The Tribunal has no jurisdiction in claims of pure tort, meaning a wrongful act or omission which does not also constitute maladministration. Had it such jurisdiction then, of course, issues such as whether such a claim might be covered by privilege and, if so, whether by qualified privilege or absolute privilege would have to be considered and whether privilege was displaced by malice, had malice been proved. Clearly this Tribunal has no jurisdiction to consider or adjudicate upon such issues. Accordingly this claim is rejected.

XIV. With reference to the Applicant's precipitous expulsion from his office, such expulsion may well be an appropriate measure - and frequently is an appropriate measure - where the person suspended has been accused of dishonesty and the suspension is made pending an investigation of the accusation. This is particularly so where the dishonesty alleged is said to arise from the manner in which the suspected staff member has gone about his work. Obviously it would be unwise in the extreme to leave such a person with access to his work documents and leave him in close proximity with his colleagues and, in particular, subordinates, for such a situation would allow ready opportunities to such a suspect to remove or alter possibly incriminating documents or to otherwise alter or destroy potential evidence or to seek to conspire with his colleagues or to improperly influence them or intimidate them. No such activity and no act of misconduct was alleged against the Applicant. It was not being suggested that his removal from the premises could be justified on any such grounds.

XV. The Tribunal considers that in the light of the legitimate decision of the Executive Director not to inform fellow staff as to the reason why the Applicant had been placed on

SLWFP, that to have expelled him from the premises in the manner in which it was done, when combined with the decision not to give a reason was likely to cause people to believe that his honesty was being impugned or that he was being excluded from his office so as to prevent him from altering or destroying evidence. The Tribunal accepts that rumours very hurtful to the Applicant were likely to have circulated and that the act of expelling him from his office in the manner in which it was done added fuel to the flames. The Tribunal considers that nominal damages may be an appropriate measure of compensation when there has been a mere technical breach of a right but where no actual damage has been inflicted. The Tribunal considers that a more appropriate measure of compensation in relation to the Applicant's claim under this heading is necessary.

XVI. In view of the foregoing, the Tribunal:

(a) Orders the Respondent to pay the Applicant US$30,000 in compensation;

(b) Rejects all other claims.

(Signatures)

Kevin HAUGH
Vice-President, presiding

Spyridon FLOGAITIS
Member

Omer Yousif BIREEDO
Member

Geneva, 26 July 2001

Maritza STRUYVENBERG
Executive Secretary

United Nations **AT**

Administrative Tribunal

Distr.
LIMITED

AT/DEC/1010
26 July 2001

ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 1010

Cases No. 1119: KANJ
No. 1120: KANJ

Against: The Commissioner-General of the United Nations Relief and Works Agency for Palestinian Refugees in the Near East

THE UNITED NATIONS ADMINISTRATIVE TRIBUNAL,

Composed of: Mr. Julio Barboza, Vice-President, presiding; Ms. Marsha A. Echols; Mr. Spyridon Flogaitis;

Whereas at the request of Jamal K. Kanj, a former staff member of the United Nations Relief and Works Agency for Palestinian Refugees in the Near East (hereinafter referred to as UNRWA or the Agency), the President of the Tribunal, with the agreement of the Respondent, extended to 31 October 1999 the time-limit for the filing of an application with the Tribunal;

Whereas, on 25 October 1999, the Applicant filed an application that did not fulfil all the formal requirements of article 7 of the Rules of the Tribunal;

Whereas, on 30 December 1999, the Applicant, after making the necessary corrections, filed two Applications. The pleas in the "first case" read as follows:

"II. Pleas: Repatriation Grant, Termination Indemnity and Cost for Shipment

This is to appeal UNRWA's Commissioner-General decision and the Agency's International Staff Joint Appeals Board not to abide by its contractual obligation as a result of terminating my contract with UNRWA. (...)

I was not paid for the Repatriation Grant, Termination Indemnity and the accurate Cost for Shipment as a result of terminating my fixed-term contract with UNWRA."

Whereas the pleas in the "second case" read as follows:

"II. Pleas

This is to appeal UNRWA's Commissioner-General decision and the Agency's International Staff Joint Appeals Board recommendation for the wrongful termination of my contract. (...)

I joined UNRWA on March 2, 1997 as the Project Planning and Design Engineer (PPDE) in the Special Environment Health Programme (SEHP). I will show in this letter that UNRWA violated [United Nations]/Agency [Regulations and Rules] and that appropriate administrative procedures were not observed."

Whereas the Respondent filed his Answers in the "first case" and "second case" on 29 June 2000;

Whereas the Applicant filed Written Observations in the "first case" and "second case" on 12 November 2000 and, on 8 February 2001, the Respondent provided his comments thereon;

Whereas the Applicant submitted an additional document on 17 April 2001;

Whereas the facts in the cases are as follows:

The Applicant entered the service of UNRWA in the Gaza Field Office on 2 March 1997, as an International Staff member at the P-4 level with the title of Project Planning and Design Engineer. The Applicant was appointed for "a fixed-term of one year, subject to six months probation". The letter of appointment stated that "[a]fter completion of the probation, the appointment may, in the light of performance and continued need for the post, be extended to two years".

On 28 April 1997, the Applicant was reprimanded by his supervisor, the Chief, Special Environmental Health Programme (SEHP), for ignoring the latter's instruction concerning the completion of staff members' Periodic Evaluation Reports (PERs). Thereafter, a series of altercations took place between the Applicant and the Chief, SEHP, necessitating meetings with

the Director and Deputy-Director of UNRWA Operations, Gaza, on a number of occasions to address these problems.

On 1 July 1997, the Applicant's PER for the period 2 March to 30 June 1997 was completed. The Chief, SEHP, gave him ratings ranging from "Poor" to "Very Good", and added an additional comment as follows:

> "The staff member has indicated lack of co-operation with his supervisor; he challenged the authority of his supervisor [on] several occasions and did not listen to instructions. He even used unsuitable words and threatened to quit and take the matters to higher authorities. He is not prepared to co-operate in a constructive manner. I recommend therefore that his contract be terminated."

The Director, UNRWA Operations, Gaza, the second reporting officer, gave the Applicant an overall rating of "Poor performance", the lowest possible rating. On 8 July 1997, the Applicant rebutted his PER.

On 25 July 1997, the Director, UNRWA Operations, Gaza, wrote to the Deputy Commissioner-General, UNRWA, Gaza, recommending that the Applicant's contract not be confirmed.

On 4 August 1997, the Applicant was due to return from leave but he did not report for duty. On 7 August, he wrote to the Chief, SEHP, seeking extension of his annual leave for reasons of ill health and advising that he was travelling to Lebanon for treatment. On 11 August the Applicant transmitted a medical report from a neurospecialist in Lebanon recommending two weeks rest.

On 17 August 1997, the Agency learned that the Applicant had moved out of his house in Ramallah on 3 August without leaving a forwarding address. On 20 August 1997, the Applicant advised the Agency that his doctor recommended a further six weeks' rest.

On 31 August 1997, the Director of Administration and Human Resources, UNRWA, Gaza, wrote to the Applicant and advised him that the Agency "had decided not to extend [his] contract beyond the probationary period of six (6) months" and "[t]herefore, [his] fixed-term appointment with UNRWA [would] be terminated effective 1 September 1997".

On 11 September 1997, the Officer-in-Charge, Personnel Services Division (PSD), wrote to the Applicant advising him of the administrative arrangements for the termination of his

service and his entitlements, including shipment of his personal goods and effects. The Applicant replied on 24 September 1997 and informed the Officer-in-Charge, PSD, that he had arranged his own shipment.

On 27 October 1997, the Applicant wrote to the Commissioner-General challenging the termination of his appointment and seeking payments relating to his income taxes and "Separation benefit".

On 17 November 1997, the Applicant sent the Officer-in-Charge, PSD, an invoice in the amount of $13,829.28 and an accompanying Bill of Lading for 40 cubic metres for the shipment of his effects. As the Applicant was only entitled to a shipment of 13.08 cubic metres, he received a prorated reimbursement of $4,522.17.

On 4 December 1997, the Officer-in-Charge, PSD, responded to a query from the Applicant enclosing Staff Regulations and Rules relating to appeals to the Joint Appeals Board (JAB), and further stated "I believe at the time of your recruitment and induction you were given a set of UNRWA Staff Regulations and Rules".

On 26 January 1998, the Chief, Accounts Division, wrote to the Applicant clarifying the rules regarding his entitlement to the reimbursement of shipping costs. On 11 February 1998, the Applicant replied, seeking compensation in lieu of notice and "indemnity compensation", and inquiring further as to why the amount he had been reimbursed for his shipping costs was less than the amount he had paid.

In a letter dated 1 April 1998, which was received by the Applicant on 12 April, the Commissioner-General advised the Applicant *inter alia* that, "as [his] contract was terminated in the interest of the Agency, without notice, [he would] receive payment in lieu thereof" as well as three weeks salary "by way of termination indemnity pursuant to Regulation 9.4(c)", but that he was not entitled to a repatriation grant because he had served for less than one year. The Commissioner-General added that he had "reviewed the papers associated with the circumstances of the termination of [the Applicant's] contract and … regret[ted] to advise [the Applicant] that [he saw] no reason to change that decision".

On 22 April 1998, the Head, International Personnel Section, wrote to the Applicant and explained the appellate procedure of staff rule 111.3 and provided an abbreviated address of the International Staff Joint Appeals Board in Gaza.

On 29 April 1998, the Applicant lodged an appeal with the International Staff JAB in the "second case", in respect of his termination.

On 9 July 1998, the Applicant lodged an appeal with the International Staff JAB in the "first case", concerning the Agency's non-payment of a repatriation grant and failure to fully reimburse his shipping costs.

The JAB adopted its report in the "first case" on 27 April 1999. Its findings and conclusion read as follows.

"***Findings ...***

12. By letter dated 11 September 1997 the Agency informed the Appellant regarding his entitlements and administrative arrangements in connection with his termination from the Agency's service. The Board noted that the Appellant's letter of 27 October 1997 to the Commissioner-General is the Appellant's first letter in which he refers to an issue related in this appeal. In this letter the Appellant makes reference to the payment of a repatriation grant but not to the inadequacy of shipping entitlements.

...

15. International staff rule 111.3 states '*If [the] staff member wishes to make an appeal against the answer received from the Commissioner-General he shall submit his appeal in writing to the Secretary of the Joint Appeals Board within one month from the date of receipt of the answer.*' The Appellant received the Commissioner-General's letter of 1 April 1998 on 12 April 1998 but for reasons, which are not clear to the Board, he did not lodge his appeal until 9 July 1998. The Board also noted that the Appellant received information on appeals procedures via the Agency's letter dated 22 April 1998 and that he lodged his [appeal in the 'second case'] on 29 April 1998.

16. The Board concluded that the Appellant has not raised or substantiated any exceptional circumstances, which would justify non-compliance with the Staff Rules in relation to time limits.

Conclusion

17. The Board decided that the Appellant's appeal is not receivable."

The JAB also adopted its report in the "second case" on 27 April 1999. Its findings and recommendation read as follows.

"***Findings...***

13. The Board concluded that the appeal was receivable.

14. The Board concurs with the views of the Administration that the Appellant has failed to satisfy the onus upon him to show that there has been an abuse of the Commissioner-General's discretionary power.

15. The Board found that the terms of the Appellant's contract including the Letter of Appointment ... and the applicable Agency [Regulations and Rules] had been properly applied and that there was no indication that the Agency's decision had been motivated by prejudice or other extraneous factors.

Recommendation

16. The Board recommends that the Appellant's appeal be dismissed."

On 23 May 1999, the Commissioner-General transmitted a copy of the JAB report in the "first case" to the Applicant, and informed him as follows:

"...

The Administration took a preliminary objection to the receivability of your ... appeal (concerning entitlement to a repatriation grant and reimbursement for shipping costs), because of your delay (i) in seeking the review of the relevant administrative decisions and (ii) in filing an appeal to the Board after you received notification that the decisions you had requested be reviewed, would not be changed. In considering the issue of receivability of the ... appeal, the Board appeared to consider that you had complied with the time limits in the Rules for seeking the administrative review of the relevant decisions. However, the Board concluded that you had substantially exceeded the thirty-day time limit between receiving an answer to [your] request for a review (12 April 1998) and filing your appeal (9 July 1998). The reasons for that delay were not clear to the Board and it noted that you appeared to be well aware of the appeals procedure. In the absence of any exceptional circumstances that might justify waiving the time limit, the Board declared that your ... appeal was not receivable.

It is unfortunate that the Board did not analyze the Administration's first submission regarding the receivability of the appeal and it is not clear to me how it apparently reached the conclusion that you had complied with the time limit between notification of the decisions and then seeking administrative review. However, this issue is of academic interest only in view of the Board's recommendation that your ... appeal is not receivable due to your delay in filing the appeal after receiving notification that the relevant decisions would not be changed.

I accept the Board's conclusion and recommendation. Your ... appeal is ... dismissed."

On the same date, 23 May 1999, the Commissioner-General transmitted a copy of the JAB report in the "second case" to the Applicant, and informed him as follows:

"...

In relation to your ... appeal concerning the termination of your services at the end of the probationary period, the Board analyzed your detailed submissions and those of the Administration and concluded that you had failed to satisfy the onus on you to show that there had been any abuse of the discretionary power to terminate your appointment in the interest of the Agency. Further, the Board found that the terms of your contract, and all applicable [Regulations and Rules] had been properly applied and that there was no indication that the decision was motivated by prejudice or other extraneous factors. Accordingly, the Board recommended that your ... appeal be dismissed.

I accept the Board's conclusions and recommendation. Your ... appeal is dismissed."

On 30 December 1999, the Applicant filed the above-referenced Applications with the Tribunal.

Whereas the Applicant's principal contentions in the "first case" are:

1. The JAB erred in finding the Applicant's appeal non-receivable as time-barred, as the delay was due to the Respondent's failure to inform him of the appropriate appellate procedure.

2. The Respondent failed to comply with its contractual obligations in refusing to pay the Applicant a repatriation grant or termination indemnity.

3. The Respondent failed to comply with its contractual obligations in not fully reimbursing the Applicant for the costs of shipping his personal effects.

Whereas the Respondent's principal contentions in the "first case" are:

1. The Application, in its entirety, is non-receivable by the Administrative Tribunal in accordance with article 7 of the Tribunal's Statute as the Applicant has not exhausted UNRWA's internal remedies.

2. The Applicant's claim is factually incorrect as he received a termination indemnity. Further, the Applicant did not appeal the alleged non-payment of termination indemnity to the JAB, so this claim is non-receivable by the Tribunal.

3. In the event that the Tribunal finds the application receivable, the proper order from the Tribunal would be to remand the matter to the JAB for a rehearing on the merits.

4. As to the merits of the Application, the Applicant received a termination indemnity but was not eligible for a repatriation grant. He received a fair and reasonable reimbursement of the shipping expenses to which he was entitled.

Whereas the Applicant's principal contentions in the "second case" are:

1. The Respondent violated the International Staff Regulations and Rules and failed to observe the appropriate administrative procedures in terminating the Applicant's appointment.

2. The Applicant was the victim of retaliation and a personal vendetta.

3. The JAB failed to address the Respondent's violations of the International Staff Regulations and Rules.

4. The Commissioner-General's discretionary power to terminate a contract does not annul the Agency's contractual obligations.

Whereas the Respondent's principal contentions in the "second case" are:

1. The termination of the Applicant's appointment was a proper exercise of managerial discretion.

2. The onus of proof is on the Applicant to show that the decision to terminate his appointment was tainted by improper motivation or procedural defect.

3. The decision to terminate the Applicant's appointment was procedurally correct and not improperly motivated.

4. The Administrative Tribunal lacks the authority to "interfere with" the JAB's discretionary finding that the decision to terminate the Applicant's appointment was not improperly motivated.

The Tribunal, having deliberated from 11 to 26 July 2001, now pronounces the following judgement:

I. The Applicant has presented the Tribunal with two different cases. His first application concerns "repatriation grant, termination indemnity and cost for shipment"; the second concerns the legality of the termination of his contract by the Administration. Since the applications concern two different alleged wrongs arising from two different administrative decisions sufficiently related to each other to be considered jointly, the Tribunal will deal with them both in the same Judgement.

II. The Tribunal shall first examine the issues of repatriation grant, termination indemnity and shipping costs. The Tribunal finds that as the Applicant did not present the question of termination indemnity to the JAB, it is not receivable. With regard to the Applicant's claim for a repatriation grant and reimbursement of his shipping costs, the Tribunal notes that the JAB found that the Applicant had exceeded the time limits in filing this appeal and that, in the absence of any exceptional circumstances which might justify waiving the time limits, the appeal was not receivable.

III. Staff rule 111.3 (b) provides that "[i]f a staff member wishes to make an appeal against the answer received from the Commissioner-General he shall submit his [a]ppeal in writing to the Secretary of the Joint Appeals Board within one month from the date of receipt of the answer". The Tribunal is satisfied that on 12 April 1998 the Applicant received a letter dated 1 April 1998 from the Commissioner-General, denying his requests for (a) reimbursement of the costs of shipping his personal and household effects, as he had already received payment therefore, and (b) a repatriation grant, as none was payable under the Staff Regulations.

The Tribunal notes that the Applicant presented his appeal to the JAB on 9 July 1998, i.e. more than one month after receiving the above-mentioned letter from the Commissioner-General. It also notes the Respondent's submission "that there are no facts in this case that would cause the [T]ribunal to overcome its well established reluctance to interfere with the Joint Appeals Board's discretionary determinations", in which he cites Judgement No. 315, *Denis* (1983) in support of his contention.

The Tribunal has jurisdiction to override the JAB's "discretionary determinations" if there are indications that the JAB violated due process or that its determinations were improperly motivated. In the present case, the Tribunal has carefully reviewed the proceedings before the JAB as well as all documents submitted to the Tribunal. No indications of improper motivation or undue process have emerged from that examination. Moreover, the Tribunal notes that "the Board concluded that the Appellant has not raised or substantiated any exceptional circumstances, which would justify non-compliance with the Staff Rules in relation to time limits". Certainly, the Tribunal is not persuaded by the Applicant's allegations of his ignorance of the Agency's appeal procedures, and the failure of the Agency to provide him with the postal address of the secretariat of the JAB: first, because ignorance of the law is very rarely admitted as an excuse in any legal process; and, second, because the Agency provided the Applicant with a copy of UNRWA's Staff Regulations and Rules on his entry into service, per his own admission.

In view of the above, the Tribunal considers that the JAB correctly applied staff rule 111.3 (c) and that this application is not receivable.

IV. Insofar as the termination indemnity is concerned, it was not the subject of an appeal to, or recommendation from, the JAB. In Judgement No. 624, *Muhtadi* (1999), the Tribunal stated that:

> "The Respondent's submission is that, because these matters were not before the JAB and in the absence of an agreement to submit them to the Tribunal, they are not receivable by the Tribunal. The Tribunal concludes that issues concerning the Applicant's promotion and evaluation are not properly before it, not having been considered by the JAB."

The Tribunal is satisfied that the same conclusion applies to the Applicant's plea regarding his termination indemnity in the instant case.

V. The second application concerns the termination of the Applicant's contract. The Applicant adduces that the decision to terminate his contract was discriminatory in nature and in retaliation for criticizing his supervisor, rather than due to his deficient service. In accordance with the jurisprudence of the Tribunal, the *onus probandi* falls on the Applicant and the Tribunal is satisfied that he has not proven any of these allegations.

The Applicant does not accept that his services were deficient. However, the Tribunal is satisfied that his services were considered unsatisfactory not so much because of technical deficiencies but because of his general attitude towards his supervisors. A simple reading of the dossier shows that this relationship was, to say the least, not harmonious. The Applicant expressed, with considerable candour, his negative opinions about the working methods and general approach of the Agency. He showed an innate inability to work in accordance with his direct supervisor's directions. The final remark of his PER of 1 July 1997 reads as follows:

> "The staff member has indicated lack of co-operation with his supervisor; he challenged the authority of his supervisor in several occasions and did not listen to instructions. He even used unsuitable words and threatened to quit and take the matters to higher authorities. He is not prepared to co-operate in a constructive manner. I recommended therefore that his contract should be terminated."

The Tribunal agrees with the Respondent that it is unsurprising that such an allegation of insubordination was met with a counter-allegation of personal prejudice.

Furthermore, it is obvious that the Applicant had interpreted the Staff Regulations and Rules in a rather unique fashion. He attempted to obtain certified sick leave when he was obviously not fulfilling any of the conditions of staff rule 106.3, and he shipped his personal and household goods without any regard to the established procedure governing such shipments. The

Tribunal finds that it is not unnatural that such behaviour resulted in negative reactions from the Applicant's superiors and that such reactions do not constitute prejudice or discrimination.

VI. It is clear that the Agency has a margin of discretion in terminating contracts. This is apparent from staff regulation 9.1 which provides that "[t]he Commissioner-General may at any time terminate the appointment of a staff member if, in the Commissioner-General's opinion, such action would be in the interest of the Agency".

In addition, in contracts such as that held by the Applicant, the use of the term "probation" indicates that a staff member must complete a period in which he must demonstrate efficiency and adaptation to his working conditions. The dossier in the instant case, however, leaves one with the strange impression that the Applicant believed it was the Agency that was on probation and that he was charged with evaluating the Agency's working methods and general approach to its task. While the Tribunal is of the opinion that constructive criticism should be welcomed even from a newcomer, it does not consider that the Applicant's behaviour can be so classified.

VII. The Applicant contends that he should have been kept in the Agency's service until the end of his contract. The Tribunal notes that the Applicant's contract was for a period of one year, subject to six months probation. Furthermore, his letter of appointment stated,

> "A fixed-term appointment may be terminated prior to its expiry date in accordance with the relevant provisions of the Staff Regulations and Staff Rules, in which case the Agency will give thirty days' written notice. Should your appointment be thus terminated, the Agency will pay such indemnity as may be provided for under the Staff Regulations and Staff Rules".

Since the Commissioner-General authorized payment in lieu of notice, and termination indemnity under staff regulation 9.4, the Tribunal is satisfied that the Agency complied with its obligations towards the Applicant and finds that the claim must fail.

VIII. In view of the foregoing, the Applications are rejected in their entirety.

(Signatures)

Julio BARBOZA
Vice-President, presiding

Marsha A. ECHOLS
Member

Spyridon FLOGAITIS
Member

Geneva, 26 July 2001

Maritza STRUYVENBERG
Executive Secretary